SUPREME COURT, U. S

DEC 30 1974

MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-837

ALEXANDER ERVIN WILLIAMS, a/k/a ALEXANDER ERVIN,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

****

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Fourth Circuit

****

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Alexander Ervin Williams, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States District Court for the Eastern District of North Carolina on April 26, 1974, affirmed by the United States Court of Appeals for the Fourth Circuit by per curiam decision on November 4, 1974.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of North Carolina, which is unreported, is

printed in Appendix A hereto, page 11. The decision of the United States Court of Appeals for the Fourth Circuit, which is unreported, is printed in Appendix B hereto, page 13.

JURISDICTION

The judgment of the United States District Court for the Eastern District of North Carolina (Appendix A, infra, page 11) was entered on April 26, 1974, and affirmed by decision of the United States Court of Appeals for the Fourth Circuit (Appendix B, infra, page 13) made on November 4, 1974. An order granting an extension of time within which to petition for certiorari until January 2, 1975 was issued by this Court on December 12, 1974 and is printed in Appendix C hereto, page 15 . Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254 (1), petitioner having asserted below rights and privileges conferred by the Constitution of the United States.

QUESTIONS PRESENTED

1. In a joint trial of two co-defendants, does exclusion by the Court of testimony by one co-defendant, such as would tend to show that he made a statement to State officers, with the expectation that it would not be used against him, amount to prejudicial error as to the other co-defendant?

2. In a joint trail of two co-defendants, where one co-defendant enters a

plea of guilty and testifies for the prosecution, does prejudicial error arise from the Court's failure to instruct the jury as requested by the other co-defendant's counsel to the effect that in evaluating the credibility of testimony by the testifying co-defendant the jury should consider his guilty plea and interest in the event?

3. In any event, in a joint trial of two co-defendants, where one co-defendant enters a plea of guilty and testifies for the prosecution, where the Court sustains an objection to cross-examination regarding his expectation of immunity from possible prosecution, or other favorable treatment, in return for evidence provided against the other co-defendant; and where the Court denies a request for special instruction to the jury regarding evaluation of testimony by an accomplice does the combined effect amount to prejudicial error shown in the record as a whole?

UNITED STATES CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States:

AMENDMENT VI

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be

confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

Petitioner was apprehended in the company of one Howard Ray Reeder by officers of the State of North Carolina. At the time of his arrest, Reeder voluntarily surrendered a quantity of heroin to officers. Subsequently, Petitioner and Howard Ray Reeder were charged with knowingly, willfully and intentionally possessing with intent to distribute a controlled substance in violation of Title 21, United States Code, Section 841 (a)(1). Petitioner and Howard Ray Reeder were tried together. Howard Ray Reeder pled guilty and testified in the trial to the guilt of Petitioner. Petitioner was convicted.

On cross-examination Howard Ray Reeder testified before the jury that he was not testifying as a government witness in order to help him on a leniency of a sentence, that he was not testifying to obtain leniency from the Court and from prosecution (immunity from) in the State Court; that he had not been offered any leniency at all or any immunity from prosecution. Whereupon, counsel for Petitioner sought to cross-examine Howard Ray Reeder concerning a preliminary remark by his counsel, in a

written statement given by Reeder to a member of the District Attorney's Office of the State of North Carolina. The remark made to the official of the State by counsel for Howard Ray Reeder, which Petitioner's counsel sought to elicit by cross-examination was: ". . . it is understood, of course, that any information given in this interview will not be used in any way against Mr. Reeder." Objection to such cross-examination was sustained by the Court and Petitioner excepted.

Following instructions to the jury by the Court, counsel for Petitioner requested additional instructions as to accomplice testimony and the Court denied the request. Petitioner again took exception.

The Court's instruction included the following:

> "You as jurors are the sole judges of the creditability of the witnesses and the weight their testimony deserves. You should carefully scrutinize the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to indicate whether the witness is worthy of belief. Consider the witness' intelligence, motive, and state of mind, and his demeanor and manner while on the witness stand. Consider also any relation each witness may bear to either side of the case,

> the manner in which each witness might be affected by the verdict, and the extent to which, if at all, each witness is either supported or contradicted by other evidence."

The request for additional instruction, which was denied by the Court, pertained to Accomplice Testimony and read as follows:

> "The Court instructs you that in passing upon the testimony of Howard Reeder you should scrutinize it closely, whether it is supported or unsupported, and you should only believe the same, if you do believe it, after careful and cautious consideration with the fact that he, Howard Reeder, is interested in the event, and with the further fact that he himself, upon his own admission is guilty as an accomplice of the crime charged against the Defendant, Alexander Williams."

The jury returned a verdict of guilty, as to the Petitioner, timely notice of appeal was filed and the United States Court of Appeals for the Fourth Circuit heard oral arguments on October 1, 1974 and affirmed Petitioner's conviction by per curiam decision on November 4, 1974.

REASONS FOR GRANTING THIS WRIT

(1) <u>The Trial Court committed prejudicial error when it sustained objection</u>

to cross-examination by counsel for Petitioner which would have shown motive in the form of the expectation of immunity from prosecution by the State, or other favorable treatment, in consideration for testimony against the Petitioner and the decision of the Appellate Court, affirming Petitioner's conviction conflicts with decisions of this Court on the Sixth Amendment right to confront witnesses.

Howard Ray Reeder's testimony was crucial to the government's case against the Petitioner; all the direct evidence was found upon the person of Reeder and his testimony was the connecting link between that evidence and the Petitioner which led to conviction. As this court recognized in Davis v. Alaska, --U.S.--, 39 L.Ed. 2nd 347, 94 S. Ct.____ (1974), the Sixth Amendment to the Constitution guarantees the right of an accused in a criminal prosecution to "be confronted with the witnesses against him" and"confrontation" means more than being allowed to confront the witness physically.

In Alford v. United States, 282 U.S. 687, 75 L.Ed. 624, 51 S.Ct. 218 (1931) it was held that prejudicial error resulted where the trial court refused to allow a witness for the prosecution to be asked, "Where do you live?" where the purpose of the inquiry was to show, by such facts as proper examination might develop, that his testimony was biased because given under promise or expectation of immunity . . .

Petitioner contends he was denied effective confrontation of the witness, Howard Ray Reeder, because counsel was not permitted to develop cross-examination to bring before the jury self-serving motives for testimony against Petitioner; and that such was highly prejudicial for the reason that Howard Ray Reeder was permitted to testify that he had no expectation of any leniency or any immunity and Petitioner was denied opportunity to effectively impeach this testimony.

(2) The decision of the United States Court of Appeals for the Fourth Circuit conflicts with decisions of other United States Court of Appeals pertaining to the necessity for special instructions regarding accomplice testimony.

Howard Ray Reeder had a definite interest in testifying against Petitioner for he was under indictment by the State of North Carolina for conspiracy and possession of heroin with intent to distribute, and he had yet to be sentenced following his plea of guilty to the charges before the court trying the Petitioner.

Petitioner contends that Howard Ray Reeder was the sole government witness connecting Petitioner to the purchase, transportation or possession, or even with any knowledge, of the heroin surrendered from Mr. Reeder's possession; hence his testimony was crucial to the governments case.

In Dunn v. United States, 318 F2d 89 (1963), the United States Court of Appeals for the Fifth Circuit held that it constituted reversible error to refuse to give a cautionary instruction as to accomplice testimony. In United States v. Davis, 439 F2d 1105 (1971), the United States Court of Appeals for the Ninth Circuit held that it was prejudicial error for the trial judge to refuse to grant a cautionary instruction as to accomplice's testimony where (1) a prosecution against the accomplice was still pending, (2) the accomplice's attorney had talked to the prosecuting attorney about the disposition of his case, (3) the accomplice hoped that by testifying, as he did, against the defendant, he would be helped in his own pending case, (4) the accomplice gave contradictory stories in an apparent attempt to inculpate the defendant rather than himself, and (5) the defendant's guilt rested almost entirely upon the accomplice's testimony.

Relating the criteria in Davis to Howard Ray Reeder's circumstances as he testified against the Petitioner, (1) a prosecution for narcotics violations was still pending; (2) his attorney had discussed the disposition of possible state charges against his client with the state's prosecutor, (3) he had good reason to believe that by testifying against Mr. Williams he would be helped in his own case, (4) from his testimony, it could be inferred that he was attempting to minimize the importance of his role as an accomplice by casting responsibility for initiating, planning, financing and distributing the heroin upon Petitioner,

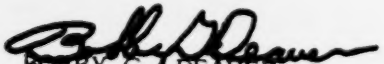
and (5) Petitioner's guilt rested almost entirely, if not entirely, upon Reeder's testimony.

At the least, Petitioner contends that he was entitled to a cautionary instruction that would have alerted the jury to Reeder's interest in testifying against Petitioner and guidelines against which that interest could be measured in assessing Reeder's credibility and that decisions by other Appellate Courts recognizing these rights conflict with the Fourth Circuit decision affirming his conviction.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,



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APPENDIX "A" TO PETITION

Judgment and Commitment

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA	)	
	)	
v.	)	No. 74-12-Cr-3
	)	FAYETTEVILLE DIVISION
ALEXANDER ERVIN WILLIAMS	)	
	)	

On this 11th day of March, 1974, came the attorney for the government and the defendant appeared in person and by Willis Brown, counsel, entered a plea of not guilty and requested trial by jury.

ON April 24, 25, and 26, 1974 TRIAL BY JURY: With counsel Willis Brown and Bobby Deaver.

IT IS ADJUDGED that the defendant upon his plea of not guilty and a verdict of guilty by the jury, has been convicted of the offense of knowingly, willfully and intentionally possessing with the intent to distribute a controlled substance as defined in Title 21, U.S.C., Section 812, Schedule I(b)(10), said controlled substance being and consisting of approximately 66.9 grams of herion, in violation of Title 21, U.S.C., Section 841 (a)(1), as charged and on April 26, 1974 the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing

to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of twelve (12) years and in addition a special parole term of three (3) years is imposed pursuant to the provisions of Title 21, U.S.C., Section 841(b)(1)(A).

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

s/ALGERNON L. BUTLER
United States District Judge

(SEAL)

s/JOHN R. WHITTY
Clerk

APPENDIX "B" TO PETITION

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 74-1676

United States of America,

Appellee,

versus

Alexander Ervin Williams,
a/k/a Alexander Ervin,

Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Fayetteville. Algernon L. Butler, District Judge.

Argued October 1, 1974 Decided November 4, 1974

Before BOREMAN and BRYAN, Senior Circuit Judges, and WARRINER, District Judge

Bobby G. Deaver (Brown, Fox and Deaver on brief) for Appellant; Joseph W. Dean, Assistant United States Attorney, (Thomas P. McNamara, United States Attoreny, on brief) for Appellee.

PER CURIAM:

Alexander Ervin Williams, a/k/a Alexander Ervin, and Howard Ray Reeder were charged in an indictment with possession of heroin with intent to distribute in violation of Title 21 U.S.C. Section 841 (a)(1). Reeder entered a plea of guilty to the charge and Williams was tried and convicted by a jury on his plea of not guilty.

Upon consideration of the record, the briefs and appendices, and arguments of counsel we find no reversible error. The judgment of conviction and sentence of appellant Williams will be affirmed.

Affirmed.